Supreme Court, U. S.
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No. 76-251

In the

Supreme Court of the United States

OCTOBER TERM, 1976

JANE SUDLER, N/K/A JANE duFRESNE,
Petitioner-Appellant,

vs.

LOUIS SUDLER, JR.,
Respondent-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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Jane Sudler, now known as Jane duFresne, respectfully prays that a Writ of Certiorari issue to review the decision of the Appellate Court of Illinois, Second District.

OPINION BELOW

The order of the Illinois Supreme Court denying leave to appeal from the Appellate Court to the Supreme Court was entered summarily and without stating specific grounds on May 20, 1976. A true copy of the notice of the issuing of the mandate is attached hereto as Appendix A. The opinion of the Appellate Court of Illinois, Second District, was filed on February 20, 1976. A true copy thereof is attached hereto as Appendix B.

JURISDICTION

The order of the Supreme Court was entered on May 20, 1976. The jurisdiction of the Court is invoked under 28 U.S.C. §1257(3) and 28 U.S.C. §2101(e).

QUESTIONS PRESENTED

The issue presented in this case is whether the decision of the Appellate Court is in conflict with this Court's ruling in *Commissioner* v. *Lester*, 366 U.S. 299 (1961).

STATEMENT OF THE CASE

The subject of this petition is the construction of the following provisions of an agreement between husband and wife incorporated in the divorce decree filed January 29, 1968, to wit:

"6. The husband agrees to pay the wife each month until the first to occur of his death, her death, her remarriage or the elapse of eleven (11) years from the date hereof, as and for alimony, the sum of Eight Hundred Dollars ($800.00). In the event of the death of the husband or the death or remarriage of the wife prior to the elapse of eleven (11) years from the date of this Agreement, the husband, or his estate, shall pay to the wife each month until said period of eleven (11) years from the date of this agreement has elapsed (and thereafter nothing), the sum of Seven Hundred Dollars ($700.00). In the event of the elapse of eleven (11) years prior to the death of the husband or death or remarriage of the wife, the husband shall pay to the wife each month, until the first to occur of his death or her death or remarriage, as and for alimony, the sum of Six Hundred Dollars ($600.00).

• • •

"8. It is understood by the parties that the said child support and alimony is based upon the husband's net income on his employment of Twenty-four Thousand Dollars ($24,000.00) annually, and the income from investments of approximately Four Thousand Dollars ($4,000.00) annually."

The cause first reached the Illinois Appellate Court in *Sudler* v. *Sudler*, 6 Ill.App.3d 546. The opinion of Presiding Justice Seidenfeld, in which both Justices Abrahamson and Moran joined, stated, in part:

> "This agreement contains some characteristics of periodic alimony, but also language commonly identified with a lump sum settlement." *Sudler* v. *Sudler*, ibid., 286 N.E.2d 113, 114.

The opinion continues:

> "We conclude that the language of this agreement is ambiguous in that it can be understood in more than one sense, and that parol evidence is thus admissible to determine the intention of the parties.
>
> "Plaintiff's offer of proof showed that in the continuing negotiations leading to this settlement agreement, several letters referring to a proposed agreement including a lump sum settlement were exchanged between the respective attorneys. The particular details of the proposed agreement were continued in a draft agreement prepared by plaintiff's attorney and sent to defendant's attorney under date of September 25, 1967. The proposed agreement provided that the defendant pay the plaintiff $1,000 per month, of which $900 was child support and $100 was alimony. In addition, the wife was to get a lump sum of $25,000 payable over a ten (10) year period. If the wife remarried, this sum was to be reduced to $15,000. In October, 1967, defendant's attorney sent to plaintiff's attorney a letter including a revised agreement accompanied by a chart showing what money plaintiff would receive both before and after remarriage, during the first eleven (11) years and also

after the eleven (11) years. The amounts payable were changed so as to consider tax consequences. This revised agreement, including the payments as explained in the chart, became part of the Decree.

"This evidence would be of aid in determining the true intent and agreement of the parties, and should be considered by the trial court." *Sudler* v. *Sudler,* ibid., 286 N.E.2d 113, 115.

Subsequently, on June 5, 1972, a hearing was had and evidence taken as to the underlying motivations of the parties in making the agreement. Those who testified were Mr. John S. Woodward, counsel for the wife at the time the negotiations leading to the agreement were undertaken, Mr. Perry Snyderman and Mr. Louis Rudnick, attorneys for the former husband, and Mrs. Jane duFresne, the former wife.

At the conclusion of the hearing, the judge found that a lump sum for the former wife had been intended in the amount of $15,000 since her remarriage. The judge was of the opinion that "they merely wanted to give Mr. Sudler a possible tax benefit." The judge found that the $700 per month payment mentioned in the second sentence of Provision Number 6 of the Decree consisted of $400 child support, $200 to compensate her for the additional income tax, and $100 as part payment on the $15,000 lump sum settlement. Thus, all that she was receiving on account of the alimony in gross after her remarriage was this sum of $100 per month.

The former wife appealed to the Appellate Court once more. The Appellate Court affirmed the holding of the trial court, essentially on the basis that the decision was not against the manifest weight of the evidence. The former wife, on April 26, 1976, filed in the Illinois Supreme Court a petition for leave to appeal from the Appellate Court to the Supreme Court. The former husband, the appellee, filed a motion to dismiss. The Supreme Court dismissed the petition summarily on May 20, 1976.

REASONS FOR GRANTING THE WRIT

The record reveals that the facts of this case fall into two distinct periods. The first period involved negotiations amongst the attorneys which produced a document which was ambiguous both as to the character of the payments — whether periodic or lump sum — and as to the maximum limits of payments contemplated by the parties. In the second period, the intent was rendered even more ambiguous when the parties attempted to restructure the agreement for tax purposes.

While there is dispute as to the character of the payments, all parties do agree that the intent of the agreement was to create certain tax advantages for the former husband. *Commissioner* v. *Lester,* 366 U.S. 299 (1961), teaches that absent express language, all payments will be considered alimony and not child support. Thus, the advantage sought, that the entire payment would be taxable to the former wife, is achieved by failing to characterize any of the sum as child support and by spreading it out over a period of eleven years.

The fact that the parties intended a lump sum is made clear by the second part of Paragraph Six. If the payments had been intended to be periodic, and thus terminable upon remarriage, the parties would not have seen fit to include the second sentence of Paragraph Six. It is not disputed that the parties contemplated the remarriage of the former wife.

Important procedural and substantive questions are raised here which should be settled by this Court. For these reasons, Petitioners request that a Writ of Certiorari issue to review the decision of the Courts of Illinois.

Respectfully submitted,

LANCE HADDIX
33 North Dearborn Street
Suite #815
Chicago, Illinois 60602
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Lance Haddix, counsel for Petitioner, hereby certify that I have this 18th day of August, 1976, served true copies of the foregoing Petition for Writ of Certiorari upon Cox & Lyle, 526 Crescent Boulevard, Glen Ellyn, Illinois 60137, by depositing same, first class postage prepaid, in the United States mail chute at 33 North Dearborn Street, Chicago, Illinois 60602. All parties required to be served have been served.

Lance Haddix

APPENDIX

(Letterhead of)
STATE OF ILLINOIS
Office of
CLERK OF THE SUPREME COURT
Springfield
62706

Clell L. Woods
Clerk

Telephone
Area Code 217
782-2035

June 11, 1976

Mr. Lance Haddix
Attorney at Law
33 North Dearborn Street
Suite 720
Chicago, Illinois 60602

In re: Jane Sudler, n/k/a Jane duFresne, petitioner, vs. Louis Sudler, Jr., respondent. No. 48448

Dear Mr. Haddix:

You are hereby notified that the mandate in the above entitled cause has today been issued to the Clerk of the Appellate Court, Second District.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court

CLW:jae
cc: Cox & Lyle

74-31

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 1st day of December, in the year of our Lord one thousand nine hundred and seventy five, within and for the Second District of Illinois:

FIRST DIVISION

Present — Honorable William L. Guild, Presiding Justice
Honorable Glenn K. Seidenfeld, Justice
Honorable Albert E. Hallett, Justice
Loren J. Strotz, Clerk
William A. Klusak, Sheriff

Be It Remembered, that afterwards, to wit: On February 20, 1976 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

No. 74-31

In The
Appellate Court Of Illinois
Second District
First Division

Jane Sudler, n/k/a
Jane duFresne,

Plaintiff-Appellant,

v.

Louis Sudler, Jr.,

Defendant-Appellee.

Appeal from the Circuit Court of DuPage County for the Eighteenth Judicial Circuit.

(Filed Feb 20 1976)

Mr. Presiding Justice Seidenfeld delivered the opinion of the court:

The plaintiff, Jane Sudler (now Jane duFresne) appeals from an order construing a divorce decree following our remand (See *Sudler* v. *Sudler,* 6 Ill.App.3d 546 (1972)). In accordance with our mandate the trial court received parol evidence as to the intended meaning of the following provisions of a support and property settlement agreement incorporated in the divorce decree entered on January 29, 1968:

> "6. The Husband agrees to pay the Wife each month until the first to occur of his death, her death, her remarriage or the elapse of eleven (11) years from the date hereof, as and for alimony, the sum of Eight Hundred Dollars ($800.00). In the event of the death of the Husband or the death or remarriage of the Wife prior to the elapse of eleven (11) years from the date of this Agreement, the Husband, or his estate, shall pay to the Wife each month until said period of eleven (11) years from the date of this agreement has elapsed (and there-

after nothing), the sum of Seven Hundred Dollars ($700.00). In the event of the elapse of eleven (11) years prior to the death of the Husband or death or remarriage of the Wife, the Husband shall pay to the Wife each month, until the first to occur of his death or her death or remarriage, as and for alimony, the sum of Six Hundred Dollars ($600.00).

8. It is understood by the parties that the said child support and alimony is based upon the Husband's net income on his employment of Twenty-four Thousand Dollars ($24,000.00) annually, and the income from investments of approximately Four Thousand Dollars ($4,000.00) annually."[1]

In the prior appeal we reversed and remanded the judgment of the trial court which had found the first provision to be one for periodic alimony thus terminating further alimony payments upon the remarriage of the wife. We concluded that the agreement contained some characteristics of periodic alimony but also that there was language commonly identified with a lump sum settlement in lieu of alimony. (6 Ill.App.3d 546, 549.) We therefore found the agreement ambiguous and remanded the cause to permit the introduction of parol evidence to determine the intention of the parties.

On remand the trial judge found that, based upon the pre-decretal negotations, the agreement was for a lump

[1] Paragraph 7 of the agreement incorporated in the decree provided:

"7. The Husband agrees to pay to the Wife as and for child support for the said minor children, during the minority of each of them (which shall continue until each reaches the age of twenty-one (21) years or until the sooner death of the Husband or any of such minor children) the sum of One Hundred Twenty-five Dollars ($125.00) per month for each such minor child."

The couple had four minor children at the time the divorce decree was entered.

sum settlement in lieu of alimony in the maximum amount of $25,000, but reduced to $15,000 since the wife had remarried. The court further found that the $700 per month payment mentioned in the second sentence of paragraph 6 of the agreement consisted of $400 per month for child support, $200 to compensate the wife for additional income tax, and $100 per month as part payment of the $15,000 lump sum settlement. The court computed the balance due at $9,300, $3,400 of which it found to be presently due. The remaining balance was ordered paid in monthly installments of $100 over 59 months.

In reaching this conclusion, the trial court heard testimony from the plaintiff, from John Woodward who had been her attorney at the time of the negotiations for the divorce settlement, and from the husband's attorneys at the time of the negotiations, Perry Snyderman and Lewis Rudnick, and further considered various correspondence and tabulations presented by the parties.

It appears from the testimony of attorney Woodward that he had no independent recollection of the intentions of the parties nor the actual agreement which was contemplated. His testimony is, however, consistent with the fact that the parties were discussing a lump sum settlement in lieu of alimony in the total amount of $25,000 with periodic payments over a period of eleven years to be reduced in the case of the wife's remarriage to the sum of $15,000. The witness recalled that the final agreement was for the purpose of creating a tax advantage for the husband by applying more of the periodic payments towards the alimony settlement and less towards child support.

Attorney Snyderman testified that at no time during the negotiations was a lump sum figure in excess of $25,000 ever discussed.

Lewis Rudnick testified that the controverted provision was intended to create payments which would be taxable to the wife. He said that a lump sum settlement of

$25,000, reduced to $15,000 after remarriage, was contemplated in the negotiations. In the provision as finally drafted the periodic payments were rounded off and structured into the agreement to provide tax advantages to the defendant and a financial incentive for the plaintiff.

The plaintiff testified, however, that she had consistently rejected the offer of the maximum of $25,000 to be reduced to $15,000 on remarriage. She said that she was to receive somewhat over $100,000 and that this was to be spread over eleven years for the purpose of saving her husband taxes. She testified that she received $500 per month as child support for four children and $800 per month in alimony. The $800 payments had been reduced to $700 per month in alimony and were paid for several months after her remarriage until her former husband stopped making further $700 payments.

We conclude that the court's finding that the actual agreement of the parties was contained in the draft which was under consideration before it was "restructured" in final form for tax purposes is not against the manifest weight of the evidence. The further finding that the provision for the $700 payment (in the event of remarriage) consisted of $400 for child support ($100 per month for each child), $200 additional to compensate the wife for income tax consequences, and $100 per month as part payment of the lump sum settlement in lieu of alimony is also consistent with the evidence. When the $400 is divided by the number of minor children and added to the $125 per month for each minor child in paragraph 7 of the agreement, the resultant figure of $225 per month for each child is consistent with the similar figure mentioned in the correspondence and draft during the predecretal negotiations. The trial court was not required to give credibility to the wife's testimony as to what the agreement sought to accomplish. To do so would have required the assumption that the final agreement was unrelated to the draft of the agreement which was restructured and that the parties then agreed to a lump

sum in lieu of alimony amounting to $92,400, plus $100 per month in alimony for eleven years, plus $600 alimony thereafter, in addition to the $500 specifically expressed as child support. It appears very improbable from the record that the wife had rejected the $25,000/$15,000 offer and that the settlement suddenly became one of approximately $100,000 in the course of tax restructuring.

We therefore affirm the judgment of the trial court construing the disputed provisions of the divorce decree in accordance with our directions on remand.

We are, however, concerned with one consequence of the trial court's finding which appears to result in an unfair and inequitable result with respect to the husband's liability for child support. As a result of the trial court's conclusion that $400 of the provision for monthly payments of $700 under paragraph 6 of the agreement represented child support of $100 per child per month, it appears that the wife is equitably entitled to receive payment of arrearages of child support which were incorporated in paragraph 6 for tax purposes. An agreement to avoid tax consequences by giving the husband the ability to deduct for income tax purposes payments which were actually intended for child support should not be enforced to permit the husband to thus avoid part of his responsibility to support his minor children during the period when they were in the custody of the wife. We therefore remand the cause for the purpose of computation by the court of the arrearages in child support premised on the agreement of the parties as we have found it. We direct that judgment in the amount so found to be due shall then be entered for the plaintiff. See *Snip* v. *Snip,* 35 Ill.App.2d 427, 432-3 (1962).

Judgment affirmed and cause remanded with directions.

GUILD and HALLETT, J.J. concur.

UNITED STATES OF AMERICA

State of Illinois,)
Appellate Court,) ss.
Second District,)

I, Loren J. Strotz, Clerk of the Appellate Court, in and for said Second Judicial District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the Opinion of the said Appellate Court in the above entitled cause of record in my said office.

In Testimony Whereof, I have set my hand and affixed the seal of the said Appellate Court, in Elgin, in said State, this 20th day of February, A.D. 1976.

/s/ Loren J. Strotz
Clerk Appellate Court, Second District